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OFFICE OF PETITIONS

In re Application of	:	
Zubok, et al.	:	
Application No. 10/781,498	:	ON PETITION
Filed: February 18, 2004	:	
Attorney Docket No. 532/3X9b	:	

This is a decision on the petition filed June 25, 2004, requesting that the above-identified application be accorded a filing date of February 18, 2004, with drawings of Figures 4a-4e as a part of the original disclosure of the application.

The application was filed on February 18, 2004 as a continuation application of prior application No. 10/688,632. However, the drawings of Figures 4a-4e described in the specification were omitted.

On June 25, 2004, one (1) sheet of drawings containing Figures 4a-4g were filed with the present petition. Furthermore, petitioners state that the drawing containing Figures 4a-4e was expressly incorporated by reference in the above-identified application filed February 18, 2004.

The petition is dismissed.

The mailing of a "Notice of Omitted Items" permits the applicant to either: (1) promptly establish prior receipt in the USPTO of the items at issue (generally by way of a date-stamped postcard receipt (MPEP 503)), or (2) promptly submit the omitted items in a nonprovisional application and accept the date of such submission as the application filing date. An applicant asserting that the missing items were in fact deposited in the PTO with the application papers must file a petition (and the appropriate petition fee) with evidence of such deposit. An applicant desiring to submit the omitted items in a nonprovisional application and accept the date of such submission as the application filing date must file any omitted items with an oath

or declaration in compliance with 37 CFR 1.63 and 1.64 referring to such items and a petition under 37 CFR 1.182 (with the petition fee under 37 CFR 1.17(h)) requesting the later filing date within two months of the date of the "Notice of Omitted Items" (37 CFR 1.181(f)).

In this case, petitioners neither assert that the missing drawings were actually deposited in the PTO on February 18, 2004, with the other application papers nor request a later filing date. Please note, petitioner states, "The attached drawing sheet containing FIGS. 4a-4g was inadvertently omitted from the drawing sheets that were originally filed with the instant application."

Instead, applicants seek to add the drawings of Figures 4a-4e to the present application on the basis that the drawings were incorporated by reference. However, no petition is necessary for that purpose. New drawings may be entered by the primary examiner without a petition so long as the drawings contain no new matter. See MPEP § 608.02(a).

MPEP 201.06(c) states that:

. . . an applicant may incorporate by reference the prior application by including, in the application-as-filed, a statement that such specifically enumerated prior application or applications are "hereby incorporated herein by reference." The statement may appear in the specification or in the application transmittal letter. The inclusion of this incorporation by reference of the prior application(s) will permit an applicant to amend the continuing application to include any subject matter in such prior application(s), without the need for a petition.
(emphasis supplied)

If applicants desire that Figures 4a-4e be added to the application, the appropriate procedure is by way of amendment requesting the entry of the drawing. Any such amendment should be filed prior to the first action on the merits and will be considered by the primary examiner. It is noted that applicants filed such a preliminary amendment on May 4, 2004.

Accordingly, the petition is inappropriate and is subject to dismissal.

The petition fee will not be refunded, since the petition was not necessitated by any error on the part of the USPTO.

The application is being returned to the Office of Initial Patent Examination for further processing.

Telephone inquiries concerning this matter may be directed to the undersigned at (703) 306-9200.

A handwritten signature in black ink, appearing to read 'EJ Tannouse', with a long horizontal flourish extending to the right.

Edward J. Tannouse
Petitions Attorney
Office of Petitions
United States Patent and Trademark Office